

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

KAREN RODRIGUES,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 1:22-cv-01077-JLT-GSA

**FINDINGS AND RECOMMENDATIONS
TO GRANT PLAINTIFF’S MOTION FOR
SUMMARY JUDGMENT IN PART, TO
REMAND FOR FURTHER
PROCEEDINGS, AND TO DIRECT
ENTRY OF JUDGMENT IN FAVOR OF
PLAINTIFF AND AGAINST DEFENDANT
COMMISSIONER OF SOCIAL SECURITY**

(Doc. 15, 17)

I. Introduction

Plaintiff Karen Rodrigues seeks judicial review of a final decision of the Commissioner of Social Security denying her applications for social security disability benefits and supplemental security income pursuant to Titles II and XVI of the Social Security Act.¹

II. Factual and Procedural Background

In both applications Plaintiff alleged disability onset date of January 23, 2020. The Commissioner denied the applications initially on September 14, 2020, and on reconsideration on December 14, 2020. Plaintiff appeared for a telephonic hearing before an Administrative Law Judge (the “ALJ”) on May 24, 2021. AR 31–65. The ALJ issued an unfavorable decision dated July 23, 2021. AR 12–30. The Appeals Council denied review on June 27, 2022. AR 1–6.

¹ The parties did not consent to the jurisdiction of a United States Magistrate Judge. Doc. 10, 12.

1 **III. The Disability Standard**

2 Pursuant to 42 U.S.C. §405(g), this court has the authority to review a decision by the
 3 Commissioner denying a claimant disability benefits. “This court may set aside the
 4 Commissioner’s denial of disability insurance benefits when the ALJ’s findings are based on legal
 5 error or are not supported by substantial evidence in the record as a whole.” *Tackett v. Apfel*, 180
 6 F.3d 1094, 1097 (9th Cir. 1999) (citations omitted). Substantial evidence is evidence within the
 7 record that could lead a reasonable mind to accept a conclusion regarding disability status. *See*
 8 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). It is more than a scintilla, but less than a
 9 preponderance. *See Saelee v. Chater*, 94 F.3d 520, 522 (9th Cir. 1996) (internal citation omitted).

10 When performing this analysis, the court must “consider the entire record as a whole and
 11 may not affirm simply by isolating a specific quantum of supporting evidence.” *Robbins v. Social*
 12 *Security Admin.*, 466 F.3d 880, 882 (9th Cir. 2006) (citations and quotations omitted). If the
 13 evidence could reasonably support two conclusions, the court “may not substitute its judgment for
 14 that of the Commissioner” and must affirm the decision. *Jamerson v. Chater*, 112 F.3d 1064, 1066
 15 (9th Cir. 1997) (citation omitted). “[T]he court will not reverse an ALJ’s decision for harmless
 16 error, which exists when it is clear from the record that the ALJ’s error was inconsequential to the
 17 ultimate nondisability determination.” *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008).

18 To qualify for benefits under the Social Security Act, a plaintiff must establish that
 19 he or she is unable to engage in substantial gainful activity due to a medically
 20 determinable physical or mental impairment that has lasted or can be expected to
 21 last for a continuous period of not less than twelve months. 42 U.S.C. §
 22 1382c(a)(3)(A). An individual shall be considered to have a disability only if . . .
 23 his physical or mental impairment or impairments are of such severity that he is not
 24 only unable to do his previous work, but cannot, considering his age, education, and
 25 work experience, engage in any other kind of substantial gainful work which exists
 26 in the national economy, regardless of whether such work exists in the immediate
 27 area in which he lives, or whether a specific job vacancy exists for him, or whether
 28 he would be hired if he applied for work.

42 U.S.C. §1382c(a)(3)(B).

26 To achieve uniformity in the decision-making process, the Commissioner has established a
 27 sequential five-step process for evaluating a claimant’s alleged disability. 20 C.F.R. §§ 416.920(a)-
 28 (f). The ALJ proceeds through the steps and stops upon reaching a dispositive finding that the

1 claimant is or is not disabled. 20 C.F.R. §§ 416.927, 416.929.

2 Specifically, the ALJ is required to determine: (1) whether a claimant engaged in substantial
3 gainful activity during the period of alleged disability, (2) whether the claimant had medically
4 determinable “severe impairments,” (3) whether these impairments meet or are medically
5 equivalent to one of the listed impairments set forth in 20 C.F.R. § 404, Subpart P, Appendix 1, (4)
6 whether the claimant retained the residual functional capacity (“RFC”) to perform past relevant
7 work, and (5) whether the claimant had the ability to perform other jobs existing in significant
8 numbers at the national and regional level. 20 C.F.R. § 416.920(a)-(f). While the Plaintiff bears
9 the burden of proof at steps one through four, the burden shifts to the commissioner at step five to
10 prove that Plaintiff can perform other work in the national economy given her RFC, age, education
11 and work experience. *Garrison v. Colvin*, 759 F.3d 995, 1011 (9th Cir. 2014).

12 **IV. The ALJ’s Decision**

13 At step one the ALJ found that Plaintiff had not engaged in substantial gainful activity since
14 the alleged onset date of January 23, 2020. AR 17. At step two the ALJ found that Plaintiff had
15 the following severe impairments: cerebrovascular accident; methamphetamine intoxication;
16 chronic pain; headaches; and obesity. AR 17. The ALJ also found at step two that there was no
17 objective or clinical evidence to establish a medically determinable impairment, severe or non-
18 severe, of degenerative disc disease or left sided carpal tunnel syndrome. AR 19.

19 At step three the ALJ found that Plaintiff did not have an impairment or combination thereof
20 that met or medically equaled the severity of one of the impairments listed in 20 C.F.R. Part 404,
21 Subpart P, Appendix 1. AR 19–20.

22 Prior to step four, the ALJ evaluated Plaintiff’s residual functional capacity (RFC) and
23 concluded that Plaintiff had the RFC to perform light work as defined in 20 CFR 404.1567(b) with
24 the following limitations:

25 . . . lift or carry occasionally 20 pounds and frequently 10 pounds; stand or walk
26 about six hours of an eight hour workday; and sit about six hours of an eight hour
27 workday; occasionally climb, stoop, crouch, crawl, or kneel; with bilateral upper
28 extremities occasional pushing or pulling and overhead reaching; and with left,
minor, upper extremity frequent handling or fingering.

1 AR 21–24.

2 At step four the ALJ concluded that Plaintiff could perform her past relevant work as an
3 office manager and custom order clerk. AR 24–25. Accordingly, the ALJ concluded that Plaintiff
4 was not disabled since the alleged onset date of January 23, 2020. AR 25.
5

6 **V. Issue Presented**

7 Plaintiff asserts four claims of error: 1- remand is required because the ALJ ignored medical
8 evidence of record in finding that Ms. Rodrigues’ carpal tunnel syndrome and degenerative disc
9 disease were not medically determinable impairments; 2- remand is required because the ALJ failed
10 to consider mental impairments alleged by the claimant or proven in the medical evidence of record;
11 3- remand is required because the ALJ failed to either adopt mental limitations he found credible
12 in his RFC or to explain why such credible limitations were being omitted; and 4- remand is
13 required because the ALJ and appeals council judges had no legal authority to adjudicate this case
14 because they were not properly appointed. MSJ at 4–20, Doc. 15.

15 **A. Legal Standard**

16 Before proceeding to steps four and five, the ALJ must first determine the claimant’s
17 residual functional capacity. *Nowden v. Berryhill*, No. EDCV 17-00584-JEM, 2018 WL 1155971,
18 at *2 (C.D. Cal. Mar. 2, 2018). The RFC is “the most [one] can still do despite [his or her]
19 limitations” and represents an assessment “based on all the relevant evidence.” 20 C.F.R. §§
20 404.1545(a)(1), 416.945(a)(1). The RFC must consider all of the claimant’s impairments,
21 including those that are not severe. 20 C.F.R. §§ 416.920(e), 416.945(a)(2); Social Security Ruling
22 (“SSR”) 96–8p.
23

24 In doing so, the ALJ must determine credibility, resolve conflicts in medical testimony and
25 resolve evidentiary ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039–40 (9th Cir. 1995). “In
26 determining a claimant’s RFC, an ALJ must consider all relevant evidence in the record such as
27 medical records, lay evidence and the effects of symptoms, including pain, that are reasonably
28

1 attributed to a medically determinable impairment.” *Robbins*, 466 F.3d at 883. *See also* 20 C.F.R.
 2 § 404.1545(a)(3) (residual functional capacity determined based on all relevant medical and other
 3 evidence). “The ALJ can meet this burden by setting out a detailed and thorough summary of the
 4 facts and conflicting evidence, stating his interpretation thereof, and making findings.” *Magallanes*
 5 *v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989) (quoting *Cotton v. Bowen*, 799 F.2d 1403, 1408 (9th
 6 Cir. 1986)).

8 **B. Analysis**

9 **1. Left Extremity Neuropathy and Degenerative Disc Disease**

10 A medically determinable impairment (MDI) is one that results from “anatomical,
 11 physiological, or psychological abnormalities that can be shown by medically acceptable clinical
 12 and laboratory diagnostic techniques.” 20 C.F.R. §§ 404.1521, 416.921.

13 The ALJ found there was no such evidence in the record to establish an MDI of carpal
 14 tunnel syndrome or degenerative disc disease. AR 19.

15 To the contrary, as Plaintiff emphasizes, a July 30, 2020 nerve conduction study and
 16 electromyography test (NCS/EMG) showed “mild left median neuropathy localized at the wrist
 17 consistent with carpal tunnel syndrome” and “severe left ulnar neuropathy localized at the elbow
 18 consistent with cubital tunnel syndrome.” AR 691 (emphasis added). The ALJ explicitly found
 19 there was no evidence to support an MDI of carpal tunnel (median neuropathy due to compression
 20 at the wrist) but made no mention of cubital tunnel (ulnar neuropathy due to compression at the
 21 elbow). Perhaps in response to the ALJ’s imprecise language, Plaintiff somewhat conflates the two
 22 syndromes though they are distinct syndromes and described in the NCS/EMG report as such.
 23 Notwithstanding, the ALJ erred in failing to find MDIs of carpal tunnel syndrome and cubital tunnel
 24 syndrome of the left upper extremity.
 25

26 The ALJ also found no evidence of an MDI of degenerative disc disease. AR 19. Again,
 27
 28

1 as Plaintiff emphasizes, that finding is undermined by Dr. Birdi's diagnoses and treatment of
2 cervical degenerative disc disease (AR 688) and related MRI abnormalities including bulging discs
3 and foraminal narrowing (AR 698–99). The record also reflects chiropractic treatment for the same
4 in September and October 2020 (AR 708, 712–13), physical therapy during the same time period
5 (AR 879–904) which noted physical examination findings of reduced strength (AR 879), and
6 reduced range of motion (AR 900).

7
8 Defendant's counterarguments generally revolve around the theme of harmless error. The
9 Ninth Circuit has explained that "the court will not reverse an ALJ's decision for harmless error,
10 which exists when it is clear from the record that the ALJ's error was inconsequential to the ultimate
11 nondisability determination." *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008) (emphasis
12 added).

13
14 To begin, Defendant argues that "Plaintiff fails to demonstrate how a determination that
15 degenerative disc disease and carpal tunnel syndrome were medically determinable impairments
16 would have changed the outcome of the ALJ's disability determination since Plaintiff's
17 impairments did not support additional limitations than those set forth by the PAMFs of Drs. Wong
18 and Bobba as well as the ALJ's consistent RFC determination." Resp. at 13, Doc. 17. What
19 limitations those impairments supported (and their disabling effect) is certainly the ultimate
20 question. However, the Ninth Circuit's characterization of the harmless error doctrine as quoted
21 above does not offer a safe haven for the Defendant where the ALJ plainly overlooked three
22 MDIs, one of which, ulnar neuropathy, was described as severe on EMG/NCS testing.

23
24 Further, it is not persuasive for Defendant to focus on Drs. Wong and Bobba's prior
25 administrative findings (or "PAMFs"). Neither the PAMFs nor the ALJ's discussion of same
26 necessarily cures an error committed at step two with respect to MDIs. The ALJ's decision to give
27 those PAMFs significant weight cannot be sustained if the ALJ made that decision based on an
28

1 incomplete view of Plaintiff's MDIs. PAMFs in and of themselves carry little to no evidentiary
2 value, rather they constitute substantial evidence only when supported by independent clinical
3 findings or other evidence. *Saelee*, 94 F.3d at 522; *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th
4 Cir.1995)); *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002).

5
6 Defendant also suggests that Plaintiff waived the issue by failing to challenge the PAMFs,
7 or the ALJ's reliance on the same. Defendant cites authority about waiver as a general matter but
8 does not cite to authority suggesting a claimant must overly challenge the PAMFs on appeal or the
9 ALJ's reliance on the same.

10
11 Defendant further contends that the error was harmless because step-two is nothing more
12 than a de-minimis screening device used to dispose of groundless claims, and here the ALJ's
13 decision proceeded past step two with respect to other MDIs. Although that is true, once the claim
14 proceeds past step two the ALJ must only consider impairments that are medically determinable,
15 whether severe or non-severe. *See* 20 C.F.R. § 404.1545 (explaining the agency considers "all of
16 your medically determinable impairments of which we are aware, including your medically
17 determinable impairments that are not "severe.""). The fact that the analysis continued past step two
18 with respect to other MDIs does not cure the error in finding the left arm neuropathy and cervical
19 impairments were not MDIs. Such an erroneous finding would permit the ALJ to ignore those
20 purported non-MDIs at the critical RFC stage.

21
22 Finally, Defendant emphasizes that despite incorrectly finding no MDIs at step two with
23 respect to neuropathy or degenerative disc disease, the ALJ did in fact discuss the related medical
24 evidence in the RFC analysis. Indeed, the ALJ explained as follows:

25
26 . . . MRI of the cervical spine showed minimal central disc bulge at C5-6
27 with slight left foraminal narrowing (Exhibit 6F/15). EMG/NCS performed in July
28 2020 demonstrated abnormal left upper nerve conduction with normal right upper
nerve conduction and normal bilateral upper needle EMG exam (Exhibit 6F/8).

. . .
She presented with pain in the thoracic and cervical spine for several months.

1 She was referred for chiropractic treatment with improvement in her symptoms
2 (Exhibits 5F; 9F). By October 2020, she reports less pain following treatment
3 (Exhibit 9F/1).

4 AR 22–23.

5 This discussion by the ALJ was fairly brief in that the ALJ described only “abnormal left
6 upper nerve conduction” whereas a more complete description would be “*severe left ulnar*
7 *neuropathy localized at the elbow consistent with cubital tunnel syndrome*” and “*mild left median*
8 *neuropathy localized at the wrist consistent with carpal tunnel syndrome*” AR 691 (emphasis
9 added). Thus, the ALJ’s limited description discounts the significance of the severe ulnar
10 neuropathy and fails to recognize the two distinct neuropathies at issue.

11
12 It is often said that an ALJ’s summary of medical evidence is no substitute for an RFC
13 analysis. That is particularly true where, as here, the summary of the evidence was contradicted by
14 the ALJ’s step two finding that Plaintiff had no MDIs with respect to left upper extremity
15 neuropathy or degenerative disc disease. Although the RFC perhaps reflects some attempt to
16 accommodate the impairments at issue in that it limits reaching, pushing, pulling, and manipulative
17 activities, at a minimum the ALJ’s conflicting discussion suggests those impairments were not fully
18 or adequately addressed when formulating the RFC.

19
20 In sum, it is not clear that the error was inconsequential to the ultimate non-disability
21 determination. Thus, the error cannot be considered harmless. *Tommasetti*, 533 F.3d at 1038.

22 **2. Aphasia and Anxiety**

23 Plaintiff contends the ALJ failed to consider, at any stage of the analysis, Plaintiff’s mental
24 impairments of aphasia and anxiety following a January 2020 methamphetamine related stroke.
25 MSJ at 7–9. Plaintiff emphasizes the following evidence: 1- a January 2020 exam noted she was
26 aphasic, unable to understand even “simple commands,” had right and left confusion, had right
27 hemianopsia, and had phonemic paraphasia (AR 739, 743); 2- upon discharge from rehabilitation
28

1 in February 2020, she had difficulty with expressing needs, independent memory function, and
2 complex problem solving (AR 462); and 3- she “continued to suffer with aphasia, difficulty
3 comprehending, and agitation related to aphasia through December 2020 (AR 628, 630, 634, 647,
4 687, 726, 729).” *Id.* at 8.

6 With respect to her anxiety, Plaintiff contends the ALJ only acknowledged that Plaintiff
7 was alleging disability due to anxiety (AR 21) but did not subsequently discuss it. Specifically,
8 Plaintiff emphasizes the following evidence: 1- a March 2020 anxiety diagnosis and prescription
9 for Celexa (AR 638-40); 2- a May 2020 ER visit for an acute anxiety attack at which she was
10 prescribed Hydroxyzine upon discharge (AR 570); 3- a July 2020 and October 2020 visit c/o
11 anxiety (AR 623, 896); and 4- she was continued on Hydroxyzine in December 2020 (AR 835).

13 Defendant responds that the ALJ reasonably considered Plaintiff’s mental impairments.
14 First, Defendant notes that ALJ considered whether Plaintiff’s methamphetamine use was a severe
15 impairment and concluded it was not. Resp. at 17. In so concluding, Defendant notes that the ALJ
16 performed the psychiatric review technique (PRT), considered the four broad areas of mental
17 functioning (the “paragraph B criteria”), and explained why Plaintiff had no more than a mild
18 limitation in each area. *Id.* However, Defendant’s discussion is not responsive to Plaintiff’s claims
19 of error concerning aphasia and anxiety. The severity, or lack thereof, of Plaintiff’s
20 “methamphetamine use” is not the issue as there is no suggestion Plaintiff was using
21 methamphetamines on an ongoing basis, or suffered ongoing mental impairments as a result of
22 chronic substance abuse.² Rather, as the ALJ acknowledged, Plaintiff had a one-time
23 cerebrovascular event (i.e. a stroke) in January of 2020 “related to” her methamphetamine use³.
24
25

26 ² If that were the case, the relevant inquiry would be as set forth in the regulations which specifically address
27 substance abuse at 20 C.F.R. 416.935, which disallows an award of benefits where: a) the ALJ finds drug addiction
or alcoholism; and, b) the substance abuse is a contributing factor material to the determination of disability. The
ALJ did not make these findings or consider that regulation.

28 ³Plaintiff testified she did not use methamphetamines thereafter, and the ALJ did not indicate there was any evidence
suggesting otherwise. AR 21.

1 Her contention is that she suffered cognitive issues (aphasia) and anxiety following that event which
2 were diagnosed and treated as set forth in the records cited above. Importantly, the ALJ's
3 discussion of the PRT and consideration of the four areas of mental functioning do not mention
4 aphasia, the associated cognitive manifestations, anxiety, or cite any of the corresponding evidence
5 as the ALJ's discussion was largely limited to Plaintiff's reported activities and what those activities
6 purportedly demonstrated. AR 18-19.

7
8 As far as the medical evidence, the only citation the ALJ provided at step two was to Exhibit
9 3F to support the proposition that "her memory and intellectual function were *fairly intact* upon
10 examination," and "clinical findings show *no* difficulties in cognitive functioning, memory, and
11 concentration." AR 18-19 (emphasis added). "Fairly intact" is a somewhat ambiguous description
12 which does not necessarily have a benign connotation. "No difficulties with cognitive function,
13 memory, or concentration" is quite a strong assertion and requires commensurately strong support
14 yet the ALJ cited Exhibit 3F in its entirety which is 47 pages of inpatient hospital rehabilitation
15 records from January 2020 to February 2020 following her stroke. The ALJ did not specify which
16 pages or findings were relied upon. Further, as discussed above, Plaintiff cited counterexamples
17 of cognitive difficulties including an example from Exhibit 3F. *See* AR 462 (noting difficulty with
18 expressing needs, independent memory function and complex problem solving).
19
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21 At step two the ALJ also referenced "other evidence detailed below." In the subsequent
22 RFC section the ALJ did provide a bit more detail:

23 On January 22, 2020, claimant presented to the emergency room (ER) complaining
24 of left-sided weakness and right facial droop. Despite denying drug and alcohol use,
25 urine toxicology was positive for amphetamines. Diagnostic assessment included
26 methamphetamine abuse and she was discharged home (Exhibit 2F/45, 52). The
27 following day, she was admitted after presented with altered mental status that was
28 likely meth intoxication, acute ischemic cerebrovascular accident with no neuro
deficit and chronic pain syndrome. She was discharged to rehabilitation for acute
physical therapy, occupational therapy and speech therapy. Discharge diagnoses
included cerebrovascular accident, altered mental status, and acute cerebrovascular
accident with some hemorrhagic transformation with right-sided weakness, chronic

1 pain syndrome, and amphetamine use (Exhibit 12F/2-5). *Subsequent progress notes*
2 *document slow but steady improvement (Exhibits 3F; 5F; 9F).*

3 She was seen in the ER in May 2020 for right facial numbness and dysphagia.
4 Diagnostic imaging is within normal limits. Her headache improved with Ativan
5 and on recheck, she has no facial numbness, hand numbness or headache prompting
6 her stable discharge (Exhibit 12F/61, 65). Due to musculoskeletal complaints as well
7 as headaches, diagnostic workup was recommended in June 2020 (Exhibit 6F/4-5).
8 MRI of the cervical spine showed minimal central disc bulge at C5-6 with slight left
9 foraminal narrowing (Exhibit 6F/15). EMG/NCS performed in July 2020
10 demonstrated abnormal left upper nerve conduction with normal right upper nerve
11 conduction and normal bilateral upper needle EMG exam (Exhibit 6F/8).

12 When seen August 19, 2020, she reports poor sleep but improvement in her
13 headaches. While slightly unsteady gait is noted, the rest of the physical examination
14 is within normal limits. *It is noted that she had no difficulty understanding or finding*
15 *words (Exhibit 6F/1). The following month, she reports the CVA affected her*
16 *memory and she has difficulty reading and coming up with words.* Additionally, she
17 feels she has some right-sided weakness and continues to work with physical
18 therapy. Of note, she states her migraines have been better and only gets it
19 occasionally, maybe once a month (Exhibit 11F/9).

20 Immediately following the stroke, the claimant had significant right-sided
21 symptoms (Exhibit 3F/8). By the end of her acute rehabilitation, she had shown
22 modest improvement. She remained medically stable during her rehab stay; right
23 hemiparesis continues to improve to near normal muscle strengths and coordination
24 also improved (Exhibit 3F/9, 46-48). Office visit notes show the claimant's
25 complaints of chronic pain that she attributed to the stroke. She presented with pain
26 in the thoracic and cervical spine for several months. She was referred for
27 chiropractic treatment with improvement in her symptoms (Exhibits 5F; 9F). By
28 October 2020, she reports less pain following treatment (Exhibit 9F/1).

29 In December 2020, she presents to the ER complaining of constant headache for the
30 past four days that was associated with nausea and blurred vision (Exhibit 12F/88).
31 Other than slight right-sided deficit, objective findings were unremarkable (Exhibit
32 12F/92). Her headache was addressed with migraine cocktail resulting in complete
33 resolution of her headache and she was subsequently discharged (Exhibit 12F/94).
34 During a follow-up visit later that month, she states she continues to have migraine
35 headaches almost every day, 25/30 days of the month. Elavil was stopped and she
36 was started on Gabapentin (Exhibit 11F/3).

37 AR 22-23 (emphasis added).

38 Although this RFC discussion was much more detailed than the ALJ's step two discussion,
39 it primarily addressed physical manifestations of the stroke including left sided weakness, facial
40 droop, facial numbness, right sided weakness, dysphagia, hand numbness, migraines,

1 musculoskeletal pain, nausea, blurred vision, coordination and gait.

2 As it concerns aphasia, the ALJ's relevant findings were few. First, the ALJ stated that the
3 record demonstrated overall slow but steady improvement following her stroke, which is non-
4 specific and was substantiated by generalized citations to exhibits 3F, 6F, and 9F in their entirety.
5

6 Next, the ALJ notes that "when seen August 19, 2020 . . . she had no difficulty
7 understanding or finding words (Exhibit 6F/1)", though the following month she reported difficulty
8 with memory and coming up with words. AR 22. However, this example of a benign notation
9 related to aphasia in the 12 months following the stroke (AR 684), is offset by Plaintiff's detailed
10 numerous examples to the contrary, including: 1- a January 2020 exam noting that she was aphasic,
11 unable to understand even "simple commands," had right and left confusion, had right hemianopsia,
12 and had phonemic paraphasia (AR 739, 743); 2- upon discharge from rehabilitation in February
13 2020, she had difficulty with expressing needs, independent memory function, and complex
14 problem solving (AR 462); and 3- she "continued to suffer with aphasia, difficulty comprehending,
15 and agitation related to aphasia through December 2020" (AR 628, 630, 634, 647, 687, 726, 729).
16 *Id.* at 8. Defendant does not dispute the accuracy or completeness of Plaintiff's factual discussion,
17 but offers one additional counterexample, namely the September 16, 2020 visit notes indicating no
18 aphasia. Resp. at 19 (citing AR 730). Again, these two examples appear to be outweighed by those
19 cited by Plaintiff making affirmance not appropriate.
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22 Finally, Defendant emphasizes that "where evidence is susceptible to more than one
23 rational interpretation, it is the ALJ's conclusion that must be upheld." *Burch v. Barnhart*, 400
24 F.3d 676, 679 (9th Cir. 2005). However, that principle is best reserved for situations where the
25 ALJ acknowledges the normal and abnormal medical findings alike and attempts to reconcile the
26 two, rather than disregarding the latter.
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28 With respect to anxiety, the ALJ mentioned the condition on exactly one occasion,

1 specifically that “Claimant sustained a methamphetamine related stroke on January 23, 2020 with
2 residual symptoms, anemia, anxiety.” AR 21. The ALJ did not cite or discuss the related evidence
3 as Plaintiff detailed including: 1- a March 2020 anxiety diagnoses and prescription for Celexa (AR
4 638-40); 2- a May 2020 ER visit for an acute anxiety attack at which she prescribed Hydroxyzine
5 upon discharge (AR 570); 3- July 2020 and October 2020 visits c/o anxiety (AR 623, 896); and 4-
6 she was continued on Hydroxyzine in December 2020 (AR 835). These records may not
7 necessarily be extensive, or even strongly indicative of profound functional limitations, but the
8 ALJ’s discussion of anxiety was more or less non-existent.
9

10 Finally, Defendant again explains at length the purported significance of the prior
11 administrative findings (PAMFs) of Drs. Franco and Milan at the initial and reconsideration levels
12 of review. AR 17-18. Defendant emphasizes that Drs. Franco and Milan reviewed the pertinent
13 evidence Plaintiff emphasizes and found no more than mild limitations in any area of functioning,
14 and that the ALJ explained his reasoning for adopting their opinions. Resp. at 17-18. In short, the
15 argument is not persuasive. The ALJ did little more than recite Drs. Franco and Milan’s opinions
16 and assert in a conclusory fashion that they are persuasive and consistent with the record. AR 24.
17 Importantly, this deference does not demonstrate that the ALJ examined and considered the
18 pertinent evidence. The Commissioner’s consistent focus on PAMFs is not helpful to their
19 argument. Although the state agency consultants’ PAMFs are relevant considerations under the
20 regulations (20 C.F.R. § 404.1513a(b)(1)), they only constitute substantial evidence when
21 supported by independent clinical findings or other evidence. *Saelee*, 94 F.3d at 522; *Andrews v.*
22 *Shalala*, 53 F.3d 1035, 1041 (9th Cir.1995)); *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir.
23 2002). Claimants are statutorily entitled to a *de novo* review by an ALJ “based on evidence adduced
24 at the hearing.” See 42 U.S.C. § 405(b); SSR 83-46c (“the Social Security Act provides each
25 claimant with a right to a *de novo* hearing.”); SSR 77-4 (“The claimant’s right to a *de novo* hearing,
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1 if he wishes one, is made clear by the reference in section 205(b) to the claimant's right to a decision
2 based on evidence 'adduced at the hearing.'"). Simply giving deference to PAMFs could ultimately
3 render the right to *de novo* review by an ALJ illusory. As the Ninth Circuit has stated in other
4 contexts, *de novo* review "considers the matter anew, as if no decision had been rendered." *Dawson*
5 *v. Marshall*, 561 F.3d 930, 932 (9th Cir. 2009).

7 Therefore, Remand is appropriate for the ALJ to consider the above-cited evidence
8 concerning Plaintiff's aphasia and anxiety and the functional limitations attributable to those
9 impairments.

10 3. Incorporation of Mild Mental Limitations

11 Plaintiff next contends in regard to mental limitations that the ALJ's opinion is internally
12 inconsistent in that while the ALJ did find at least mild mental limitations in the four functional
13 categories at step two, the ALJ failed to incorporate them into the RFC which makes no
14 accommodation for mental limitations. But this argument fails as there is no controlling authority
15 stating that mild limitations must be incorporated into an RFC. The existence of two marked
16 limitations, or one extreme limitation, satisfies listing 12.15 and is per se disabling, whereas an
17 impairment causing no more than mild limitations in any area is generally considered a non-severe
18 impairment. 20 C.F.R. § 416.920a(d)(1).

19 Plaintiff cites authority requiring the agency to "*consider*" the functional effects of both
20 severe and non-severe impairments at the RFC stage, but that does not necessarily require the ALJ
21 to *articulate* such consideration, nor does it mean the ALJ must *incorporate* mild limitations in the
22 RFC. MSJ at 10 (citing 20 C.F.R. §§ 404.1523(c), 404.1545(a)(2), 404.1529(d)(4), 416.923(c),
23 416.945(a)(2), 416.929(d)(4) (requiring adjudicators to consider the functional effects of all
24 medically determinable impairments, not merely those which are severe, when formulating the RFC
25 finding). As for *moderate* limitations, by contrast, some courts have found they must be
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1 incorporated in the RFC. *See, e.g. Wascovich v. Saul*, 2:18-CV-659-EFB, 2019 WL 4572084, at
2 *4 (E.D. Cal. Sept. 20, 2019) (“Where the ALJ accepts the medical assessment of moderate
3 limitations, those limitations must be accounted for in the RFC.”); (citing *Betts v. Colvin*, 531 F.
4 App’x 799, 800 (9th Cir. 2013)).

6 Plaintiff reliance on isolated examples of district court opinions from other circuits holding
7 otherwise are not consistent with the regulations as discussed above. MSJ at 14 (citing *Richardson*
8 *v. Saul*, 511 F.Supp.3d 791, 798-99 (E.D. Ky. 2021) (overturning a step 4 finding because the ALJ
9 did not explain why the RFC finding omitted mild mental functional limitations identified in the
10 PRT analysis).

12 However, it is another matter entirely whether Plaintiff’s aphasia and anxiety, singly or in
13 combination, cause moderate or greater limitations in the four areas of mental functioning and
14 whether they should therefore be incorporated into the RFC. The ALJ should consider this on
15 Remand after discussing the evidence of Plaintiff’s aphasia and anxiety.

16 **4. Proper Appointment of ALJ and Appeals Council**

18 Finally, Plaintiff contends that both the ALJ and the Appeals Council judges had no legal
19 authority to adjudicate this case. Plaintiff explains that under the Federal Vacancies Reform Act
20 (FVRA) 5 U.S.C. § 3346(a), former acting Commissioner Berryhill’s term (which began on January
21 20, 2017) should have expired 210 days later on November 16, 2017, and that Ms. Berryhill
22 unlawfully persisted as acting Commissioner through the date Andrew Saul became Commissioner
23 on June 17, 2019. Therefore Plaintiff contends that former acting Commissioner Berryhill had no
24 authority to take the action she took on July 16, 2018 in ratifying the appointment of SSA’s ALJs
25 and Appeals Council judges (*See* SSR 19-1p, 2019 WL 1324866) and thus neither the ALJ nor the
26 Appeals Council judges had authority to adjudicate the instant case.

28 Plaintiff provided little discussion of this issue. Plaintiff’s argument is predicated on two

1 out of circuit district court opinions: *Brian T. D. v. Kijakazi*, 2022 WL 179540 (D. Minn. Jan. 20,
 2 2022) and *Richard J.M. v. Kijakazi*, 2022 WL 959914 (D. Minn. Mar. 30, 2022). These opinions,
 3 although they discuss this issue quite thoroughly, are not controlling. Further, as Defendant
 4 emphasizes, these cases are no longer good law following the decision in *Dahle v. Kijakazi*, 62
 5 F.4th 424 (8th Cir. 2023), cert. denied sub nom. *Dahle v. O'Malley*, 144 S. Ct. 549, 217 L. Ed. 2d
 6 293 (2024).

8 Notably, Plaintiff's brief was filed January 2, 2023, which was after the issuance of the two
 9 district court cases in *Brian* and *Richard* in 2022, and before the Eight Circuit's decision in *Dahle*
 10 on March 7, 2023. Thus, Plaintiff's reliance on the district court authority was not an oversight on
 11 Plaintiff's part. Nevertheless, Plaintiff does not contend in her reply brief that those district court
 12 cases are still good law, nor contend that any other controlling or persuasive authority has similarly
 13 held, and her reply brief does not otherwise revisit the issue of the alleged improper appointment
 14 of the ALJs and Appeals Council judges by former acting Commissioner Berryhill.

16 VI. Findings

17 Remand is appropriate for the ALJ to conduct a new hearing and issue a new decision.
 18 Specifically, the ALJ should reconsider all evidence concerning Plaintiff's: 1- severe left ulnar
 19 neuropathy (cubital tunnel syndrome); 2- mild left median neuropathy (carpal tunnel syndrome);
 20 3- cervical degenerative disc disease; 4- aphasia and anxiety.

22 VII. Recommendations

23 For the reasons stated above, the recommendation is as follows:

- 24 1. That Plaintiff's motion for summary judgment (Doc. 15) be **GRANTED in part**.
- 25 2. That Defendant's cross-motion (Doc. 17) be **DENIED in part**.
- 26 3. That the matter be remanded to the Commissioner of Social Security pursuant to
 27 sentence four of 42 U.S.C. § 405(g) for further proceedings consistent with the
 28

Findings and Recommendations.

4. That the Court Clerk of Court be directed to enter judgment in favor of Plaintiff Karen Rodriguez and against Defendant Commissioner of Social Security.

VIII. Objections Due Within 14 Days

These Findings and Recommendations will be submitted to the United States District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within fourteen (14) days after being served with these Findings and Recommendations, any party may file written objections with the Court. The document should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” The parties are advised that failure to file objections within the specified time may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

IT IS SO ORDERED.

Dated: June 4, 2024

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE